

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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SECURITIES AND EXCHANGE COMMISSION, )  
ET AL., )  
Petitioners, )  
v. ) No. 21-1239  
MICHELLE COCHRAN, )  
Respondent. )  
- - - - -

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1 P R O C E E D I N G S

2 (11:35 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 21-1239, SEC versus  
5 Cochran.

6 Mr. Garre.

7 ORAL ARGUMENT OF GREGORY G. GARRE

8 ON BEHALF OF MICHELLE COCHRAN

9 MR. GARRE: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 The question in this companion case is  
12 whether the SEC Act strips district courts of  
13 jurisdiction that they have historically  
14 possessed to adjudicate and enjoin structural  
15 constitutional violations, here, in the form of  
16 an agency decisionmaker that is  
17 unconstitutionally insulated from removal by the  
18 President.

19 But, unlike the Axon case, in which  
20 the plaintiff is a corporation, this case  
21 illustrates the crucial importance of this  
22 district court jurisdiction for everyday  
23 Americans who find themselves trapped before an  
24 unconstitutional agency decisionmaker.

25 The SEC acts as prosecutor, judge,

1 and, in effect, executioner in its own  
2 proceedings, all of which give it an  
3 extraordinary home court advantage. And yet SEC  
4 ALJs suffer from a blatant constitutional  
5 defect, dual-layered protection from removal,  
6 that taints their very existence and vitiates  
7 their authority to act at all.

8 That structural defect inflicts a  
9 here-and-now injury that exists wholly apart  
10 from any adverse outcome in that proceeding.

11 Going back to Marbury versus Madison,  
12 this Court has recognized that district courts  
13 possess jurisdiction under 28 U.S.C. 1331 to  
14 enjoin government entities from acting  
15 unconstitutionally. Nothing in Section 78y of  
16 the SEC Act nor anything else pointed to by the  
17 government, an act in which Congress merely  
18 granted jurisdiction to the courts of appeals to  
19 hear challenges from final orders of the  
20 Commissions, takes -- takes that jurisdiction  
21 away as to the structural constitutional claims  
22 at issue here.

23 That conclusion is compelled first and  
24 foremost by the text of the relevant statutory  
25 provisions. It is compelled by this Court's

1 decision in Free Enterprise Fund, which involved  
2 the same statute and the same kind of  
3 constitutional claim, and is consistent with  
4 this Court's own Thunder Basin factors.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Mr. Garre, is there  
7 any meaningful difference between the facts of  
8 this case and the arguments in the previous  
9 case?

10 MR. GARRE: In essence, no, Your  
11 Honor. And this case is different in a few  
12 respects. Number one, Free Enterprise Fund,  
13 which we believe strongly supports Mr. Clement's  
14 position, applies even more forcefully to this  
15 case, which involves the same statute and the  
16 exact same claim here.

17 I think the statute in this case,  
18 although similar in many respects, is different  
19 in at least one respect that makes this case  
20 easier, and that's the saving clause in the SEC  
21 Act in which Congress made clear that it was not  
22 displacing traditional rights or remedies. And  
23 we think that one of the remedies that it -- it  
24 protected was the traditional remedy of going to  
25 a federal court to get an injunction against

1 agency action. But the short answer to your  
2 question is we believe that jurisdiction exists  
3 in both cases for largely the same reasons.

4 JUSTICE THOMAS: And one final  
5 question, just a short one. There's a lot of  
6 talk about these cases, orders actually being  
7 entered in the cases, and then they're subject  
8 to review. How often does that happen?

9 MR. GARRE: Very infrequently in the  
10 relative sense, Your Honor. The vast majority  
11 of these cases settle, more than 90 percent,  
12 because the individuals just frankly can't  
13 endure the years of proceedings that it takes to  
14 get to an Article III court.

15 JUSTICE THOMAS: How many years has  
16 this been going on?

17 MR. GARRE: Well, it's -- it's been  
18 going on really in our situation since  
19 Dodd-Frank, in which many of these claims have  
20 been channeled to these in-house agency  
21 proceedings.

22 Now the SEC doesn't have to act this  
23 -- this way. It can go to federal district  
24 court, in which citizens enjoy greater rights  
25 and protections. It can go before its own

1 Commission. But, instead, it elects typically  
2 to go before its own in-house ALJs, which suffer  
3 from this blatant constitutional defect.

4 And to the Chief Justice's point  
5 earlier, we think that the Jarkesy case shows  
6 exactly the flaw with the government's position,  
7 that you would have to wait some seven years in  
8 Mr. Jarkesy's case to go through those rounds of  
9 proceedings before you can finally get to an  
10 Article III court to present your constitutional  
11 claim that the agency didn't have authority to  
12 act at all against that individual.

13 CHIEF JUSTICE ROBERTS: You said since  
14 Dodd-Frank. I -- I don't have at the tip of my  
15 brain or whatever when that was.

16 MR. GARRE: 2000 -- I believe it was  
17 2010, Your Honor, 2009, 2010. That's where more  
18 of these claims were funneled into that system.

19 I -- I -- I think, on -- on -- on the  
20 Thunder Basin analysis, you know, our position  
21 is that the Court should look, in this case, as  
22 in any statutory interpretation case, first and  
23 foremost to the text of the relevant provisions.  
24 And we agree wholeheartedly with the Fifth  
25 Circuit that those provisions unambiguously



1 leave district court jurisdiction over the  
2 structural constitutional claims at issue.

3 I think one reading of Thunder Basin  
4 is that the Court applied those factors as a  
5 means of discerning congressional intent so that  
6 ultimately the Court was engaging in an inquiry  
7 into what Congress intended, albeit not in the  
8 way the Court would typically construe a  
9 statute.

10 But I think there's a -- there's an  
11 important threshold consideration that explains  
12 why Thunder Basin doesn't deal with this sort of  
13 case. The threshold question that Thunder Basin  
14 dealt with was a situation where the agency  
15 action being challenged was the agency action  
16 that was the subject of an exclusive  
17 administrative scheme. So, in the Elgin case,  
18 it was the CSRA's scheme which established a  
19 system for challenging adverse employment  
20 actions or removals. And in the Thunder Basin  
21 case, it was a scheme that challenged -- for  
22 challenging citations and other administrative  
23 orders by the Mine Act.

24 And that's what you had in both of  
25 those cases. And in that situation, where

1     you're challenging the very thing that Congress  
2     channeled to an alternative scheme, the Thunder  
3     Basin factors were actually a way in which the  
4     Court would find that jurisdiction was  
5     preserved. Even in that instance, where the  
6     thing that you're challenging is the very thing  
7     that Congress channeled through a different  
8     scheme, Thunder Basin could say that, well, no,  
9     some of those claims are so separate from that  
10    and involve things not before the agencies' ken  
11    that you can go to district court.

12                 JUSTICE JACKSON: Mr. Garre, can I  
13    just ask you, because it seems to me that the  
14    thing that is bugging me about your argument is  
15    that we could look at the statute that's here  
16    and discern that Congress intended to allow the  
17    agency to do its work and then have judicial  
18    review, not so much, you know, exactly the  
19    nature of the claims that can be brought, but at  
20    -- at a minimum, the fact that the statute  
21    requires the court of appeals to wait in general  
22    before it gets involved, you have to have a  
23    person who's been aggrieved by a final order of  
24    the Commission before the court of appeals gets  
25    involved makes me wonder whether Congress really

1 intended for 1331 to be operating to allow the  
2 district court to be issuing and considering  
3 interlocutory arguments by parties, whether  
4 they're the kind that you're making, this entire  
5 thing is unconstitutional, or other things,  
6 discovery, whatever.

7 I'm worried about a notion that 1331  
8 can be used here to undermine congressional  
9 intent about the finality of agency action  
10 before the courts come in.

11 MR. GARRE: Sure. So we don't think  
12 that there's anything in 78y of the SEC Act  
13 which indicates an intention to displace  
14 district court jurisdiction over the structural  
15 constitutional claims at issue here.

16 Now, you're right, Congress made clear  
17 that it wanted challenges to final orders to go  
18 to the courts of appeals. But another thing  
19 that's, I think, relevant to the question here  
20 is that in describing what the courts of appeals  
21 could do, it said it could set aside or modify  
22 an order on -- on the record that had been  
23 developed.

24 And I think that that's pertinent to  
25 the question here because that doesn't really

1 give us the relief that we're looking for, which  
2 is an injunction against a proceeding before  
3 unconstitutional ALJs.

4 JUSTICE JACKSON: I understand. But  
5 my question is, do we -- can we fairly discern  
6 that it was Congress's intention to allow for  
7 that kind of interlocutory argument to be made,  
8 or was it saying -- I mean, I agree with you  
9 there's nothing that suggests that that argument  
10 can't be made at all -- but can we fairly look  
11 at the language here and say that Congress  
12 intended for that kind of argument to be made  
13 while the proceedings were going on?

14 And -- and -- and I think it matters.  
15 I mean, one of the things that your colleague on  
16 the other side pointed out is that maybe there  
17 was a reason why Congress would have wanted that  
18 to be made later, in part because it may avoid  
19 having to have judicial review at all.

20 And, traditionally, our thought has  
21 been you don't jump in to decide constitutional  
22 questions. If there's a way to avoid it, you  
23 do.

24 So it seems rational to me that when  
25 Congress was putting off even court of appeals

1 review in this case, it was saying anything that  
2 you have related to the sort of constitutional  
3 nature of this, wait until the agency finishes  
4 and then everything can be brought at that time.

5 MR. GARRE: Right. So I think that  
6 set of concerns is -- is different, Your Honor,  
7 in the sense that we're suffering what this  
8 Court has called a here-and-now injury by simply  
9 having to proceed before an ALJ that is  
10 unconstitutional in its very existence. Now  
11 that's --

12 JUSTICE JACKSON: But that assumes the  
13 merits. That -- that assumes the merits, right?

14 MR. GARRE: Well, what it does, it  
15 looks to the particular kind of claim here. Of  
16 course, you're right, we have to actually prove  
17 that the removal restrictions are  
18 unconstitutional, but it's what distinguishes  
19 the structural constitutional claim from the  
20 sorts of preliminary orders that you might see  
21 in an ALJ proceeding, which don't actually  
22 aggrieve one until they're embodied in a order  
23 of the Commission, which, at that point in time,  
24 you can challenge to the court of appeals and  
25 get the relief you're asking for by having the

1 court of appeals set aside that order.

2 That's not true here, both because  
3 we're suffering this injury wholly apart from  
4 whether or not we win or lose at the end of the  
5 day before the agency.

6 JUSTICE JACKSON: But why isn't that  
7 any single person who has the type of claim that  
8 would, you know, challenge the agency review in  
9 a -- in a similar way?

10 I mean, we've heard some of the other  
11 examples of types of claims, and I'm just  
12 wondering why couldn't anybody make the argument  
13 similar to the way Justice Kagan brought up some  
14 examples, those arguments sort of challenge the  
15 unconstitutional functioning of the agency.

16 MR. GARRE: Well, I think most of the  
17 arguments that we -- that would come up tend to  
18 involve the particular facts and circumstances  
19 of the individual proceeding.

20 The structural constitutional claims  
21 are different. They're not related in any way  
22 to the facts or circumstances of a given  
23 proceeding. They -- they go to the inherent  
24 nature, existence, of the decisionmaker.

25 And -- and I think --

1 JUSTICE KAGAN: Mister --

2 MR. GARRE: -- that that's an  
3 important -- I'm sorry, Your Honor.

4 JUSTICE KAGAN: No, please.

5 MR. GARRE: I was going to say I think  
6 that's a very important distinction that this  
7 Court has drawn, for example, in the Carr versus  
8 Saul case.

9 JUSTICE KAGAN: I see a bit of a  
10 tension in the way you've started arguing this  
11 case because you've said many times the  
12 structural constitutional claims -- the  
13 structural constitutional claims are special,  
14 different. There's a -- there's a -- a real  
15 need for this kind of review.

16 And -- and Thunder Basin, you know, it  
17 -- it -- it's really a focus on what kind of  
18 claims they are. So Thunder Basin allows you to  
19 talk about that. But -- but your statutory  
20 argument really does not allow you to talk about  
21 that because there's nothing in these statutes  
22 that would -- would treat constitutional --  
23 structural constitutional claims any differently  
24 from any other claims, statutory claims, claims  
25 about just evidentiary rulings.

1           So the way you want us to -- to decide  
2   this case is going to have ramifications far  
3   beyond structural constitutional claims, and,  
4   indeed, it's very hard on your interpretation of  
5   the statute to see why the nature of the claim  
6   would have any relevance at all.

7           MR. GARRE: So I guess, first, I would  
8   say we would be comfortable if this Court  
9   followed the text of what Congress enacted and  
10   held that there was jurisdiction here and  
11   perhaps jurisdiction in other cases to be sorted  
12   out applying the tools that district courts  
13   apply all the time, exhaustion, finality, and  
14   whatnot.

15           But the second is I -- I guess I would  
16   disagree with the premise of Your Honor's  
17   question in the sense that structural  
18   constitutional claims are -- are different in --  
19   in a way that's meaningful in the statute, for  
20   example, as to the relief that you could get in  
21   the court of appeals.

22           This statute allows court of appeals  
23   to set aside or modify the final order. But, in  
24   a structural constitutional claim, that doesn't  
25   give you the relief that you're looking for. It



1 wouldn't give us the relief that we're looking  
2 for because we're looking for an injunction  
3 against this unconstitutional agency action.

4           And my friend, Mr. Stewart's answer on  
5 this question, I think, was telling. What he  
6 said in that situation is, well, you would get a  
7 decision and, you know, on -- on remand, you  
8 know, maybe the -- the -- the case that comes  
9 out of the Ninth Circuit would have to follow  
10 that, you know, which is to say that the agency  
11 might not have to follow that with respect to  
12 cases in the other circuits.

13           And we're talking, again, about the  
14 very existence, the very authority of a  
15 decisionmaker to act at all, which is different.

16           JUSTICE KAVANAUGH: So --

17           MR. GARRE: And the fact -- sorry.

18           JUSTICE KAVANAUGH: Keep going. Keep  
19 going.

20           MR. GARRE: No, I was just going to  
21 say the fact that the statute is limited in  
22 terms of the relief that the court of appeals  
23 can grant, actually, I think, does speak to why  
24 these claims were not divested by -- by  
25 Congress.

1 JUSTICE KAVANAUGH: Your broader  
2 argument, as Justice Kagan points out, would  
3 suggest, I think, starting over on how the Court  
4 analyzes this whole area. And maybe it's just  
5 out of sympathy for the district court judges  
6 and court of appeals judges who have to deal  
7 with the fallout from that.

8 But isn't a simpler way to deal with  
9 this just to -- and maybe this is your narrow  
10 argument -- you know, under the wholly  
11 collateral factor, a challenge to the structure  
12 of the agency is wholly collateral, end of  
13 story.

14 MR. GARRE: Well, I mean, with  
15 respect, I think the easiest way for the  
16 district courts to resolve this is to look at  
17 the text of what Congress enacted. We -- we  
18 think --

19 JUSTICE KAVANAUGH: I know that.  
20 There's a lot -- my point is there's a lot of  
21 precedent interpreting that text, Thunder Basin  
22 --

23 MR. GARRE: And --

24 JUSTICE KAVANAUGH: -- Elgin, Free  
25 Enterprise Fund, and going back. And so kind of

1 starting over on all that would create kind of a  
2 tsunami of litigation. Maybe that's okay.  
3 Maybe it's not. But --

4 MR. GARRE: I don't think --

5 JUSTICE KAVANAUGH: -- your -- your  
6 narrower argument, which I'm supporting for  
7 purposes of this question, is just under Thunder  
8 Basin factors, under Free Enterprise Fund, and  
9 under Elgin, we -- we're on the right side of  
10 the line because it's a challenge to the  
11 structure of the agency?

12 MR. GARRE: Right. And -- and we --  
13 we're ultimately content to win either way, Your  
14 Honor.

15 JUSTICE KAVANAUGH: Right.

16 MR. GARRE: But I -- but I do think on  
17 Thunder Basin, one thing that the last almost 10  
18 years has shown in the courts of appeals is that  
19 Thunder Basin hasn't been particularly helpful  
20 to the lower courts in resolving these issues.

21 JUSTICE KAVANAUGH: Right. I think  
22 Mr. -- when Mr. Clement said the beauty of the  
23 Thunder Basin factors, I -- I definitely cringed  
24 because that -- they have not been beautiful for  
25 --

1 MR. GARRE: Correct.

2 JUSTICE KAVANAUGH: -- in the lower  
3 courts. But, you know, the wholly collateral, a  
4 challenge to the structure of the agency, is  
5 that one paragraph of Free Enterprise Fund, kind  
6 of deals with that.

7 Now you have -- you ought to respond  
8 to what's that other paragraph of Free  
9 Enterprise Fund and how would you explain that.  
10 But --

11 MR. GARRE: Right. And -- and I think  
12 the -- I guess the way that --

13 JUSTICE KAVANAUGH: -- that -- that  
14 seems simple enough. I guess what I'm  
15 challenging and pushing back on is kind of  
16 throwing it all open again after decades of  
17 trying to figure out how these claims should be  
18 sorted out doesn't -- causes me some concern at  
19 least.

20 MR. GARRE: I guess I understand Your  
21 Honor's concern. I -- I think it should be  
22 addressed by the fact that district courts have  
23 been applying the sorts of tools in determining  
24 when or whether to exercise jurisdiction for  
25 centuries.

1           In Standard Oil, one of -- one of our  
2 friends, you know, cases they liked the most is  
3 an example of how district courts can apply  
4 those tools.

5           And -- and I think, I mean, what we're  
6 talking about here is treating this case  
7 involving the -- the -- one of the most  
8 important questions of the Court's jurisdiction  
9 differently than any other statutory  
10 interpretation case.

11           I -- I think what we would ask and  
12 hope is that this Court make clear the  
13 involvement and preeminence of the statutory  
14 text in resolving these questions. I think the  
15 Thunder Basin factors can be complementary.

16           In some respects, you could take --  
17 and Justice Kagan's question earlier, I think,  
18 alluded to this -- is, you know, one might  
19 plausibly interpret the reference to "any final  
20 order" to include a challenge to preliminary  
21 orders that wouldn't actually aggrieve someone  
22 until they were embodied in a final order.

23           And, in that respect, you know, those  
24 sorts of claims would be channeled through the  
25 review scheme. But I think, you know, here,

1     fundamentally, this case doesn't sort of fit  
2     cleanly within the Thunder Basin paradigm  
3     because we're not challenging the kind of agency  
4     action that is covered by the alternative review  
5     scheme. We're not Elgin. We're not like Elgin.  
6     We're not like Thunder Basin in that respect.

7                 We're challenging a final -- we're not  
8     challenging a final order. We're challenging  
9     something that is completely separate from that.

10                JUSTICE KAVANAUGH: Yeah, and that --  
11     in that respect, just to add one more, you're  
12     like Free Enterprise Fund, and just if you can  
13     address the part of Free Enterprise Fund that is  
14     problematic for you.

15                MR. GARRE: Sure. So we -- we think  
16     that the better reading of that is that the  
17     Court was just responding to the government's  
18     argument and that Ms. Cochran is in the same  
19     position as the plaintiff in the Free Enterprise  
20     Fund case in the sense that the only way that  
21     she could guarantee that she could get to an  
22     Article III court to raise her claim is  
23     essentially to default in her administrative  
24     proceeding.

25                In that respect, she does have to bet

1 the farm because, you know, although it's  
2 unlikely given the -- the agency's track record,  
3 if she won on the merits -- of course, we  
4 believe she shouldn't -- but if she won, she  
5 wouldn't be able to present her structural  
6 constitutional claim to a court of appeals ever.

7 And, again, just on the meaningful  
8 judicial relief, I wanted to emphasize this  
9 point that Mr. Clement made in rebuttal. Here,  
10 it's not clear that getting relief at the end of  
11 the day is going to be relief at all for this  
12 type of constitutional claim because the way to  
13 get relief for a structural constitutional  
14 violation is to immediately enjoin the agency  
15 proceedings so that you don't have to go through  
16 them.

17 I mean, under this Court's decisions  
18 in Collins versus Yellen, it's at least much  
19 more challenging to get relief retrospectively,  
20 which underscores why waiting until the end of  
21 the proceeding, you know, years down the line is  
22 not meaningful in the constitutional sense, much  
23 less in the practical sense.

24 JUSTICE KAGAN: Can -- can I take you  
25 back to Free Enterprise Fund following along

1 Justice Kavanaugh's question? I mean, there's  
2 some awfully good language in Free Enterprise  
3 Fund for you on the collateral point, as well as  
4 on the expertise point. And the collateral  
5 point is very intuitive to me here, so maybe it  
6 doesn't really matter what Free Enterprise Fund  
7 says about it.

8 But -- but I take even the first  
9 paragraph to be just responding to the  
10 government's argument. In other words, it was  
11 the strange situation in Free Enterprise Fund  
12 where they're objecting to the Board, but  
13 there's no -- but -- but you have to get to the  
14 Commission. And so they say -- and so -- and so  
15 the government says well, just, you know, seek  
16 Commission review. And the first thing that the  
17 Court says, before the second paragraph even, in  
18 the first paragraph is: Well, that would be  
19 really strange just to seek Commission review  
20 when your beef is not with the Commission's  
21 rules.

22 MR. GARRE: Right.

23 JUSTICE KAGAN: So I take even that  
24 collateral point to be not -- not quite the --  
25 not answering the collateral question.



1                   MR. GARRE: Well, I think -- and  
2     that's -- if you don't think that you're bound  
3     by Free Enterprise Fund on that point, then --  
4     then that's fine, but we think that, by far, the  
5     better position is --

6                   JUSTICE KAGAN: I guess I should say  
7     Free Enterprise Fund --

8                   MR. GARRE: -- that this is wholly  
9     collateral.

10                  JUSTICE KAGAN: -- doesn't go as far  
11     as you want it to go.

12                  MR. GARRE: Well, we think that the  
13     Fifth Circuit was right in saying that it  
14     ultimately controls. We're not -- we're not  
15     disputing that there are factual differences  
16     between the case. We don't think that they --  
17     they call for a different understanding or  
18     conclusion on any of the Thunder Basin factors  
19     if this -- if that's how this Court resolves the  
20     case.

21                  I mean, that's certainly -- I mean, I  
22     took the government not really to be fighting  
23     too hard on wholly collateral or agency  
24     expertise, and I think that they largely  
25     focused, to the extent they go into a Thunder

1 Basin analysis, on the opportunity for a  
2 meaningful judicial review.

3 And I -- and I think, as I indicated  
4 earlier, forcing individuals to -- to go through  
5 this unconstitutional proceeding with the chance  
6 that they could ultimately get to an Article III  
7 court is not meaningful judicial review in any  
8 sense.

9 JUSTICE KAGAN: And if I could just  
10 repeat the question that I asked Mr. Clement,  
11 how is it different from a person having a  
12 subject matter jurisdiction claim in a court?  
13 In other words, this is the wrong court; I  
14 shouldn't be in this court at all.

15 MR. GARRE: Right.

16 JUSTICE KAGAN: And we -- we save that  
17 until the end. How is this different?

18 MR. GARRE: I think -- I mean, first  
19 of all, it -- you're before an Article III  
20 court. You're not before an administrative  
21 decisionmaker that is not independent, protected  
22 by the protections of Article III. And I think  
23 -- and that's -- that's important. We're  
24 talking about individuals who are hauled before  
25 administrative agencies, who ultimately want to

1 present their claim to an Article III court.

2           And the other difference, of course,  
3 is subject matter jurisdiction, although, you  
4 know, protected in -- in some respects under the  
5 Constitution, here, we're talking about  
6 constitutional violations. And this Court has  
7 -- has always, going back hundreds of years,  
8 recognized the historic role of district courts  
9 in being open to hear and redress  
10 unconstitutional government action, particularly  
11 of the structural type.

12           JUSTICE SOTOMAYOR: I'm still not sure  
13 why. I thought that the whole purpose of a  
14 special review scheme, especially one that puts  
15 review in an agency, is to consolidate rather  
16 than bifurcate review of agency action.

17           And, here, as the government pointed  
18 out, when it did want a bifurcation with  
19 temporary cease-and-desist orders, Congress made  
20 an exception, sending back to the district  
21 court. So I think that really shows you that  
22 when Congress wants to send something else, it  
23 knows how to. That's what it did in the CSRA  
24 review scheme.

25           So I don't -- unlike Elgin, I have a

1     hard time thinking why the nature of the  
2     constitutional claim would deprive the parties  
3     and the -- or the district court of -- of clear  
4     guidance that that should go through the scheme.

5             MR. GARRE:   So I think --

6             JUSTICE SOTOMAYOR:   I still don't  
7     understand.  Is there something special about  
8     structural constitutional claims?  And I don't  
9     really know what they are because, for you, it's  
10    easy.  It's removal.  Okay?  But your colleague,  
11    Mr. Clement, wants to go broader on what  
12    structural is.  And I don't really see how you  
13    divide that out from just regular due process  
14    claims.  But maybe you can give me a clearer  
15    definition than I've received so far in the case  
16    law or from Mr. Clement on what structural means  
17    to you.

18            MR. GARRE:   Sure.  So --

19            JUSTICE SOTOMAYOR:   And give me some  
20    sort of special damage that you're suffering --

21            MR. GARRE:   Sure.

22            JUSTICE SOTOMAYOR:   -- under your --  
23    under that definition.

24            MR. GARRE:   So, on structural  
25    constitutional claims, I'd point you to the

1 Court's decision in Carr versus Saul, in which  
2 it recognized the class of claims of structural  
3 constitutional claims and cited --

4 JUSTICE SOTOMAYOR: I'm sorry, which  
5 case?

6 MR. GARRE: Carr versus Saul dealt  
7 with the -- the --

8 JUSTICE SOTOMAYOR: Remind me of what  
9 it said.

10 MR. GARRE: In that case, the Court  
11 held that you didn't have to exhaust  
12 Appointments Clause challenges before  
13 administrative agencies, that you could bring  
14 that independent -- bring that in Article III  
15 court. And because of the -- the unique nature  
16 of structural constitutional claims among other  
17 considerations, but in discussing structural  
18 constitutional claims, the Court cited numerous  
19 cases of examples, including the Free Enterprise  
20 Fund case.

21 In terms of why they're different,  
22 Your Honor, we're suffering by -- the mere fact  
23 of having to proceed before an unconstitutional  
24 agency decisionmaker inflicts what this Court  
25 called a here-and-now injury that exists wholly

1     apart from the ultimate outcome of that  
2     proceeding. And that's different from almost  
3     any other type of preliminary challenge you  
4     could imagine --

5             JUSTICE SOTOMAYOR: But, if there's a  
6     --

7             MR. GARRE: -- to that proceeding.

8             JUSTICE SOTOMAYOR: -- if there's a  
9     due process violation of any kind in a  
10    proceeding, whether it's a violation of the  
11    regulation or a violation of not enough notice  
12    or not enough clarity, those things, routinely  
13    we -- certainly, in court cases, we leave to the  
14    end. But I don't know why we should be  
15    permitting district court interference --

16            MR. GARRE: So I --

17            JUSTICE SOTOMAYOR: -- in the process  
18    that Congress has given to the agency to  
19    conclude that matter.

20            MR. GARRE: So I think this Court has  
21    recognized that structural constitutional claims  
22    are different in terms of how they inflict  
23    injury that's separate and unique. And the  
24    other point I would say is, in order to get  
25    meaningful redress of that injury, you need an

1 injunction that stops the proceedings, forcing  
2 you -- that prevents you from having to undergo  
3 them again.

4 And that's different from a case  
5 where, even if you've suffered a due process  
6 violation based on the particular application of  
7 a rule or a statute, you could get relief from  
8 that, getting relief from the order. That's not  
9 true with respect to this unique class of  
10 constitutional claims here.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Justice Thomas?

14 Justice Alito?

15 Anything further, Justice Sotomayor?

16 Justice Gorsuch?

17 JUSTICE GORSUCH: Just a couple quick  
18 questions, I hope. First, the government relies  
19 heavily on 704 of the APA, and I'd just like to  
20 give you a chance to address that.

21 MR. GARRE: So the APA  
22 non-jurisdictional arguments are waived in our  
23 case. They weren't addressed below. That's --  
24 that's point one.

25 Second, we're not bringing an APA

1     cause of action. Our -- our cause of action is  
2     the traditional one that this Court recognized  
3     in Free Enterprise Fund. So it's not clear to  
4     me that APA limits would apply at all.

5             And, third, I mean, ultimately, we  
6     agree with Mr. Clement that -- that the APA  
7     doesn't strip jurisdiction any more than the SEC  
8     Act does. And that's ultimately what the  
9     government would be saying, is that, you know,  
10    Congress granted this jurisdiction in 1331, the  
11    SEC Act didn't take it away, but, lo and behold,  
12    10 years later, in a different provision that,  
13    you know, didn't talk about jurisdiction,  
14    really, Congress, you know, stripped this  
15    traditional historic class of jurisdiction. And  
16    we don't think that that's a fair reading of the  
17    statute.

18            JUSTICE GORSUCH: And, second, I  
19    wanted you to explain how you thought Thunder  
20    Basin interacted, properly understood, with a  
21    plain reading of the statutes.

22            MR. GARRE: So we would -- we would  
23    start with the text of the statute. We think  
24    that the Thunder Basin factors in some ways  
25    could be relevant in thinking about what --



1     whether Congress actually intended to strip  
2     jurisdiction. I mean, for example, where you're  
3     talking about something that is wholly  
4     collateral or the agency doesn't have expertise  
5     to address, it would be unusual to think that  
6     Congress, you know, forced parties to go through  
7     the administrative proceeding to -- before  
8     getting judicial review on that.

9             So -- so, in that respect, we think  
10    the factors could inform the Court's analysis of  
11    what Congress intended and -- and supplement a  
12    textual inquiry, but we think, you know,  
13    ultimately, Congress says what it means and  
14    means what it said and that here, as the Fifth  
15    Circuit concluded, the textual analysis is quite  
16    straightforward.

17            JUSTICE GORSUCH: The textual analysis  
18    here, you know, it says final orders are  
19    reviewable in the court of appeals. And we  
20    don't have one of those.

21            MR. GARRE: Correct.

22            JUSTICE GORSUCH: I -- I could  
23    understand maybe a world in which we would look,  
24    if we had a final order, to Thunder Basin  
25    factors to see whether, nonetheless, there

1       should be room for a district court proceeding.

2               MR. GARRE:   And I -- and I think that  
3       --

4               JUSTICE GORSUCH:   I think that may be  
5       what happened in Thunder Basin.   I just want to  
6       give you a chance to react to that.

7               MR. GARRE:   I think that's exactly  
8       right, Your Honor, that -- that really, if you  
9       look at Thunder Basin and Elgin, what they say  
10      is you look first to whether you're challenging  
11      an agency action that is the subject of an  
12      exclusive judicial review scheme.

13              And at that point or if you -- if you  
14      say yes, then you can engage in the Thunder  
15      Basin analysis to see whether, nevertheless, the  
16      district courts would still have jurisdiction  
17      over that claim.

18              So we don't -- we don't get past that  
19      first stage here because we're not challenging  
20      the agency -- any agency action covered by an  
21      exclusive judicial statutory scheme.   We're  
22      challenging the final order.

23              CHIEF JUSTICE ROBERTS:   Justice  
24      Kavanaugh?

25              Justice Barrett?

1 Justice Jackson?

2 JUSTICE JACKSON: Yes. So I -- I  
3 guess you could also read the statute, as I said  
4 at the beginning, to raise the concern that  
5 you're not challenging a final order. But, if  
6 you read the statute to be Congress's intention  
7 to not allow for judicial review while the  
8 agency has the issue, then the fact that you're  
9 not challenging a final order seems -- seems  
10 problematic.

11 But let me -- let me ask you to react  
12 to something that Justice Kavanaugh started,  
13 helpfully, in the sense that he said, okay, so  
14 if we're going to craft an order consistent with  
15 your view, we could say that claims that are  
16 structural and constitutional are wholly  
17 collateral and, therefore, would be allowed to  
18 be brought under 1331 jurisdiction.

19 I'm wondering whether, to temper my  
20 concern that allowing for 1331 jurisdiction to  
21 occur for those structural claims while the  
22 agency has the issue, could we also say it has  
23 to be structural and constitutional, but it has  
24 to be the kind of thing that would permit the  
25 district court to completely terminate the

1     agency proceeding so that we don't have, like --  
2     we don't have it operating like an interlocutory  
3     review of an ongoing agency proceeding, but we  
4     have this requirement that the remedy that  
5     you're seeking as the person who's bringing the  
6     structural claim is to shut the whole thing  
7     down.

8                 MR. GARRE: Right. I -- I think the  
9     answer is yes in the sense that the structural  
10    constitutional claims are talking about the  
11    class of claims that really are going to the  
12    very existent form, inherent nature of the  
13    proceeding. So it's hard to imagine where  
14    you're making that kind of structural  
15    constitutional claim, why you would -- you would  
16    have the agency proceeding going forward.

17                I mean, ultimately, I think the  
18    district court would have discretion as to  
19    whether or not to enjoin agency proceedings. In  
20    our case, the Fifth Circuit enjoined the agency  
21    proceedings.

22                JUSTICE JACKSON: But what about the  
23    -- what about a removal claim like the one  
24    you're bringing? I mean, aren't you just  
25    saying, you know, it's not really a defect in

1 the particular adjudication, it is that if you  
2 gave us a different ALJ, one who had his removal  
3 protections set up differently, we would be  
4 fine, so if the agency paused and reconfigured  
5 the ALJ and then came back to you, they wouldn't  
6 have to start again with a new indictment or  
7 whatever it is, however they start their  
8 proceedings.

9 I mean, aren't you in a way not  
10 terminating by bringing a structural claim about  
11 ALJ removal processes, they could cure that and  
12 just keep going?

13 MR. GARRE: So I don't think they  
14 could cure that in the sense that we're  
15 challenging the constitutionality of all SEC  
16 ALJs because all SEC ALJs are unconstitutionally  
17 insulated from removal by the statutes that Mr.  
18 Clement referred to earlier.

19 So, to get redress from that, you  
20 would actually declare the statutes  
21 unconstitutional, and that's ultimately what  
22 we're asking for in this case. You can see it  
23 on page 64 of the Joint Appendix, a declaration  
24 that those statutes are unconstitutional.

25 But those go to the very authority and

1       existence of the administrative decisionmaker  
2       that Ms. Cochran currently faces.

3               CHIEF JUSTICE ROBERTS:   Thank you, Mr.  
4       Garre.

5               MR. GARRE:   Thank you, Your Honor.

6               CHIEF JUSTICE ROBERTS:   Mr. Stewart,  
7       welcome back.

8       ORAL ARGUMENT OF MALCOLM L. STEWART ON BEHALF OF THE  
9       SECURITIES AND EXCHANGE COMMISSION, ET AL.

10              MR. STEWART:   Thank you, Mr. Chief  
11       Justice, and may it please the Court:

12              Let me just make a couple of points  
13       first before taking questions.

14              Mr. Garre said that going back to  
15       Marbury versus Madison, courts have been  
16       authorized to grant injunctive relief against  
17       unconstitutional governmental action.

18              And it's certainly true that there's a  
19       longstanding practice of courts, without  
20       explicit statutory authority, granting equitable  
21       relief to claimants who would otherwise have no  
22       access to judicial review of constitutional  
23       claims.

24              But that authority has never been  
25       unlimited.  It's always been constrained by

1 doctrines about what can you sue about and when  
2 can you sue.

3 On pages 47 to 50 of our brief, we  
4 cite a series of cases of this Court that stand  
5 for the proposition that courts will not  
6 intervene in pending agency proceedings until  
7 the proceedings culminate in an order or a rule  
8 that sets legal obligations, imposes a sanction,  
9 et cetera.

10 One of those is Myers versus Bethlehem  
11 Shipbuilding. In that case, the shipbuilding  
12 company was in NLRB proceedings and said my  
13 operations don't have a sufficient connection to  
14 interstate or foreign commerce to make me  
15 regulable under the National Labor Relations  
16 Act.

17 And the Court held that's the kind of  
18 claim that has to wait until the end of the  
19 administrative proceedings, even though you are  
20 asserting a constitutional objection to the  
21 exercise of authority over you.

22 Another case is Federal Power  
23 Commission versus Metropolitan Edison that we  
24 cited. If you look at the relevant page of  
25 Metropolitan Edison, you'll see literally a page

1 of string cites to earlier cases decided before  
2 1938 that established this principle.

3 Courts don't intervene in pending  
4 agency proceedings dating all the way back to a  
5 1912 opinion written by Chief Justice Edward  
6 White.

7 And so, to us, the most difficult  
8 aspect of this came -- of this case is whether  
9 the barrier to suit should be viewed as  
10 jurisdictional or non-jurisdictional. But the  
11 most salient fact is this has never been the  
12 kind of thing a person could get immediate  
13 review of in court.

14 I welcome the Court's questions.

15 CHIEF JUSTICE ROBERTS: Counsel, in  
16 the earlier argument, I think you were making a  
17 point about it would not be a waste to send even  
18 these structural claims to an agency because the  
19 agency could address a number of factors that  
20 would go into that type of analysis.

21 MR. STEWART: It -- first, I mean, it  
22 would not be a waste for two reasons: First,  
23 because the agency could explain, for instance,  
24 why from its perspective it was either a good or  
25 a bad characteristic to have ALJs with for-cause



1 removal protection.

2 In 2015, the SEC issued an opinion in  
3 which it stated that it thought it would not be  
4 wise to make ALJs removable at will because it  
5 would impair their actual or apparent  
6 impartiality. And --

7 CHIEF JUSTICE ROBERTS: Was their --  
8 was their position a surprise?

9 MR. STEWART: I -- I think it's  
10 important -- I think it is not -- yes, it is, at  
11 least a potential surprise. That is, if the SEC  
12 Commissioners or the FTC Commissioners said the  
13 same thing about themselves, then that would be  
14 no surprise.

15 But, under Lucia, the ALJs are now  
16 treated as principal -- as officers of the  
17 United States. They have to be appointed in  
18 conformity with the Appointments Clause. They  
19 are being appointed by the Commissioners.

20 And under the usual rule that the  
21 appointing authority has removal authority, it  
22 would be the SEC Commissioners who removed ALJs  
23 if they were removable at will.

24 CHIEF JUSTICE ROBERTS: It sounds to  
25 me like you're just saying the agency might

1 write a brief, presumably, defending the  
2 structure of the agency --

3 MR. STEWART: Well, the two things we  
4 would --

5 CHIEF JUSTICE ROBERTS: -- which it  
6 can do when the case goes before the district  
7 court.

8 MR. STEWART: I -- I guess the two or  
9 three things we are -- would say are, first,  
10 yes, we could put these points in our brief, but  
11 often the point is --

12 CHIEF JUSTICE ROBERTS: My point is  
13 when you send it back, you're saying the agency  
14 would -- it would be a valuable thing to send to  
15 the agency a claim that the agency is  
16 unconstitutionally structured because you'll get  
17 the benefit of their views --

18 MR. STEWART: Well --

19 CHIEF JUSTICE ROBERTS: -- which is  
20 what you would get if you go to 1331 and we get  
21 a brief from the government.

22 MR. STEWART: You -- you would get a  
23 brief. But I think, in various contexts, the  
24 Court does sometimes distinguish between the  
25 opinions that were expressed by the agency

1 officials, the Commissioners, in their own name  
2 and the post hoc justifications from agency  
3 lawyers.

4 And it would be a self-denying  
5 position if the SEC Commissioners said, yes, we  
6 are the removing authorities, but we think it is  
7 a good thing for us not to be able to remove the  
8 ALJs at will because it would compromise their  
9 impartiality. That might or might not carry the  
10 day, the case at the end of the day, but it  
11 would not be self-aggrandizing.

12 But the second thing I would say in  
13 terms of would it be a waste of time, and this  
14 is what the Court said in Elgin, it's what the  
15 Court said in FTC versus Standard Oil, that even  
16 if the agency is not going to apply its  
17 expertise to the particular practice -- issue  
18 that is being argued about now, the agency may  
19 still apply its expertise to other subjects that  
20 will produce a ruling that will obviate the need  
21 for the court to decide the issue at the end of  
22 the day.

23 And Mr. Garre --

24 CHIEF JUSTICE ROBERTS: Well, but in  
25 -- in -- in Elgin, that argument I think would

1 have stronger force because the issues there  
2 were intertwined with the -- the constitutional  
3 claim. And, as I understand it, the -- the --  
4 the view of the Court was, just as you're  
5 suggesting is true in this case, that they have  
6 something to add to it in terms of posturing the  
7 -- the -- the claim and -- and its interaction  
8 with the -- the Civil Service Reform Act  
9 provisions.

10 But, here, your -- your multiple  
11 friends on the other side argue that's not the  
12 case at all, that this is a straightforward  
13 constitutional claim that would be presented the  
14 same way regardless of what the nature of the  
15 proceedings were.

16 MR. STEWART: Well, but they are also  
17 saying, independent of their arguments that the  
18 adjudicators are improperly insulated from  
19 removal, that they should not be held liable  
20 under the relevant statutes; that is, Axon's  
21 complaint initially had a count that sought a  
22 declaration that it hadn't violated the  
23 antitrust laws.

24 Mr. Garre was just saying that  
25 Ms. Cochran believes that she is innocent, and

1       --

2                   CHIEF JUSTICE ROBERTS: Well, is that  
3       just an alternative basis for relief or is that,  
4       as I understood it to be, an Elgin -- an  
5       intertwined -- that the constitutional claim was  
6       intertwined with the jurisdictional -- not  
7       jurisdictional -- the sort of merits of the  
8       agency issue?

9                   MR. STEWART: Well, I think the  
10      Court's point in Elgin was there was a dispute,  
11      for instance, about whether a constructive  
12      discharge had occurred. And the MSPB would  
13      obviously have expertise in the circumstances  
14      that would and would not constitute a  
15      constructive discharge.

16                  And so, at least with respect to one  
17      or more of the plaintiffs, if the MSPB had  
18      concluded you were not constructively  
19      discharged, that would have obviated the need  
20      for a court to decide whether the law providing  
21      for a male-only registration for the Selective  
22      Service was unconstitutional.

23                  And the Court said the same thing in  
24      Standard Oil, that it didn't expect the agency  
25      to devote any more resources to the reason to

1 believe determination.

2 JUSTICE KAVANAUGH: Mr. -- keep going,  
3 sorry.

4 MR. STEWART: But it thought that if  
5 the -- if the agency determined that Standard  
6 Oil was not liable, then there would be no need  
7 for judicial review. And Mr. Garre was saying,  
8 well, that means I won't have a court entertain  
9 my constitutional challenge. But the usual way  
10 of reacting to that is it's a good thing if a  
11 court doesn't need to decide a constitutional  
12 issue because the plaintiff is awarded relief on  
13 other grounds.

14 JUSTICE KAVANAUGH: In --

15 JUSTICE SOTOMAYOR: Are the -- I'm  
16 sorry.

17 JUSTICE KAVANAUGH: Go ahead.

18 JUSTICE SOTOMAYOR: I asked you this  
19 before, but I'd like you to pay attention not to  
20 the removal provision but to the clearance  
21 process. And I know that's not in this case,  
22 it's in the other one, the process, clearance  
23 process and combined investigator/  
24 prosecutor/adjudicatory challenges of the other  
25 case. Those are due process challenges.

1           Are they intertwined in the merits in  
2           a different way than the removal is?

3           MR. STEWART: I mean, they are not  
4           intertwined -- there's no real overlap between  
5           the question are those provisions valid and the  
6           question did Axon violate the antitrust laws or  
7           did Cochran violate the Exchange Act?

8           So you're right that they're not  
9           intertwined with the merits provisions. But  
10          they are still intertwined with the provisions  
11          that govern SEC adjudications and judicial  
12          review of SEC adjudications. And I would -- as  
13          I was saying in response to -- to Justice Kagan,  
14          if you had a dispute about whether an ALJ was  
15          right or wrong in excluding particular evidence  
16          that was proffered by the respondent in a  
17          proceeding, the -- the question whether the  
18          rule, the evidentiary rule, had been properly  
19          applied might be essentially unconnected to the  
20          question did Ms. Cochran violate the securities  
21          laws? But it's still the type of issue that we  
22          --

23          JUSTICE SOTOMAYOR: Well, I was  
24          thinking, on the clearance process rules, the FT  
25          -- the agency could tell us or decide to change

1     its rules.

2                   MR. STEWART:   And -- I mean, it could  
3     -- it could decide to change the rules, but  
4     you're right, that's -- that is an issue as to  
5     which the agency could surely apply its  
6     expertise, could clarify the factors that were  
7     used in determining whether to proceed in court  
8     or to proceed administratively.  It wouldn't  
9     have the barrier of a federal statute that it  
10    couldn't set aside as unconstitutional.  So  
11    that's certainly an aspect of the case as to  
12    which the agency could exercise its expertise.  
13    But -- yes.

14                  JUSTICE KAVANAUGH:  Mr. Stewart, in  
15    thinking about the precedents, I think there are  
16    good arguments both ways, as I've indicated in  
17    my questions, but then I think there's a broader  
18    question that Justice Alito raised earlier that  
19    I want to follow up on, which is what makes the  
20    most sense?  What makes the most sense for the  
21    government?  What makes the most sense for the  
22    citizens?  What makes the most sense for the  
23    court system?

24                  And I think cutting against your  
25    position on that question is you can get more



1     certainty, more clarity quicker about a basic  
2     fundamental question, about the  
3     constitutionality of the agency itself or the  
4     agency's structure itself.

5                 Now, one thing that I would be  
6     concerned about that supports you is floodgates,  
7     delay, obstruction. But, you know, unless you  
8     get -- unless the plaintiffs challenging the  
9     procedures get a preliminary injunction, the  
10    agency procedures are just going to continue on,  
11    and to get a preliminary injunction, they would  
12    have to, you know, show likelihood of success.  
13    So that would deter, I would think, frivolous  
14    claims or claims that are not meritorious.

15                So on that kind of broad way of  
16    thinking about it, the clarity, the certainty,  
17    the speed, isn't that all upside to allowing a  
18    challenge to the structure of the agency to go  
19    -- to go forward in the district court?

20               MR. STEWART: Let me say two or three  
21    things about that. The first is a decision of a  
22    district court and even a decision of a circuit  
23    court is not going to provide certainty on these  
24    issues.

25               And until this Court decides the

1 question, you could have a circuit conflict if  
2 you allowed district court review, just as you  
3 could have a circuit conflict if you allowed  
4 review only at the final --

5 JUSTICE KAVANAUGH: But it --

6 MR. STEWART: -- order stage. The --  
7 the second --

8 JUSTICE KAVANAUGH: But as Mr. Clement  
9 -- I'll let you have your second, but as Mr.  
10 Clement indicated, we have some examples out  
11 there where it's taken seven years or something  
12 to wind its way through, on the one hand; on the  
13 other hand, you know, it could -- it'll move  
14 much more quickly if it goes through the PI  
15 route and it goes through the district court  
16 route to get here. In other words, going --  
17 your point, certainty will only be provided by  
18 this Court. You'll have certainty sooner under  
19 allowing the district court proceedings, rather  
20 than under your approach, certainty from this  
21 Court sooner.

22 MR. STEWART: I mean, certainly a  
23 district court could issue a preliminary  
24 injunction very quickly, but that wouldn't  
25 provide certainty even within the circuit. Even

1 an affirmance by the court of appeals on a  
2 likelihood of success standard wouldn't provide  
3 a definitive circuit court ruling.

4 And there's really no reason to  
5 believe that, systemically, the process of  
6 getting a court of appeals ruling is likely to  
7 move more quickly if you have district court  
8 review and then court of appeals review than if  
9 you have agency review and then court of appeals  
10 review.

11 JUSTICE KAVANAUGH: You had a second  
12 point.

13 MR. STEWART: The second thing I was  
14 going to say is there is at least -- the regime  
15 that we have now is certain agency actions are  
16 reviewable and certain agency actions are not  
17 reviewable or they are not reviewable until  
18 they've kind of crystallized in a final ruling,  
19 and you focus on what is the agency action  
20 you're challenging, and then you look to the  
21 statutes that govern can you get review of that  
22 and, if so, in that court?

23 And, certainly, you can have close  
24 questions, but that -- that provides a fair  
25 amount of determinacy, and I think the regime

1     that you are postulating would create  
2     indeterminacy in two different respects.

3             First way would be courts would have  
4     to devise rules for determining what is a  
5     sufficiently systemic or structural  
6     constitutional challenge to qualify. In Free  
7     Enterprise Fund, the argument was not just that  
8     the PCAO members were improperly insulated from  
9     removal. There was also an Appointments Clause  
10    challenge which didn't prevail but was to the  
11    effect they had not been constitutionally  
12    appointed. And under that theory, they were  
13    unlawfully exercising governmental power, so  
14    every aspect of the agency's operations was  
15    alleged to be tainted.

16            Here, what Mr. Garre is focusing on is  
17    the agency adjudications, and it's a significant  
18    part of what the SEC does, but it's far from the  
19    whole thing that the SEC does. And so the Court  
20    would have to develop -- the lower courts would  
21    have to develop a framework for determining what  
22    is sufficiently structural.

23            And then you'd also have a question  
24    what non-final agency actions are reviewable for  
25    -- immediately? And so you have a very

1 established rule that you can ordinarily get  
2 judicial review of a final agency regulation,  
3 but if the issue -- if the agency issues a  
4 proposed regulation and you think it exceeds its  
5 authority under the statute, et cetera, you  
6 can't get review of that. You have to get --  
7 wait for review until it is promulgated in final  
8 form.

9 But under Respondents' theory, there  
10 would be at least the potential for somebody to  
11 say that, well, if the agency officials who were  
12 responsible for promulgating the regulation are  
13 improperly insulated from removal or if their  
14 activities or structure are subject to some  
15 other constitutional attack, then we should be  
16 able to challenge the agency regulation as soon  
17 as it's proposed because, until we know for sure  
18 whether the rule will be struck down, we can't  
19 make investment decisions, et cetera.

20 It -- it creates indeterminacy, again,  
21 not just as to what category of legal theories  
22 will get you out of the ordinary rules, but once  
23 you've articulated what a court considers to be  
24 a structural challenge, what additional  
25 categories of non-final agency action can you

1 challenge?

2 JUSTICE ALITO: Can I ask you about  
3 your reliance on collateral order doctrine  
4 cases? It's not clear to me why the situation  
5 here is in any meaningful sense parallel to the  
6 situation in a case where a party invokes the  
7 collateral order doctrine.

8 In those cases, the basis of  
9 jurisdiction that the party is claiming is 1291,  
10 which limits jurisdiction, the court of appeals'  
11 jurisdiction, to final decisions.

12 In the ordinary sense of the word, the  
13 -- the orders that fall within the collateral  
14 order doctrine are not final. They're not the  
15 last order in the case that finishes everything  
16 up. So it's a -- it -- it -- it is an exception  
17 to the ordinary meaning of clear statutory  
18 language, final decision.

19 Here you have your APA argument. I  
20 understand. But if we put that aside, the  
21 statutory language pushes in the opposite  
22 direction because 1331, if you just read it  
23 literally, gives the district court jurisdiction  
24 over that.

25 So isn't that an -- an -- an answer to

1     your argument that the collateral order, the  
2     considerations in the collateral order doc --  
3     that collateral in the collateral order doctrine  
4     cases should be read in a way that is similar to  
5     Thunder Basin's reference to a collateral case?

6             MR. STEWART:  I -- I mean, first, I  
7     think the collateral order, the -- the relevant  
8     statutory language in 1291 refers to final  
9     decisions, not to final judgments.

10            And the Court in the collateral order  
11     decisions has explained that what it has  
12     articulated is not an exception to the final  
13     decision rule -- rule.

14            It is an interpretation of the term  
15     "final decision."  And the Court has said  
16     ordinarily that is limited to final judgments,  
17     but there will be some other orders entered in  
18     the course of the proceedings that are not final  
19     judgments but that do count as final decisions  
20     because they finally resolve an issue having  
21     certain characteristics.

22            And the collateral order jurisprudence  
23     has -- overlaps substantially with the final --  
24     with the Thunder Basin factors.  That is, one of  
25     the factors is whether this order that you seek

1 to have reviewed immediately is collateral to  
2 the merits.

3 Another factor is would meaningful  
4 review be available on appeal? And that  
5 overlaps with the -- the first of the Thunder  
6 Basin factors.

7 So our argument is not that every jot  
8 and tittle of collateral order jurisprudence  
9 should be imported into this context. It's that  
10 the court in making those determinations has  
11 been weighing very similar factors.

12 And the one overarching similarity is  
13 that in both agency proceedings like the  
14 Bethlehem Shipbuilding case that I referred to  
15 earlier and under the collateral order doctrine,  
16 litigants have argued time after time review at  
17 the end of the day would not be inadequate --  
18 would not be adequate because in the meantime I  
19 will be suffering the burdens that are  
20 associated with the proceedings.

21 And time after time, the Court has  
22 said that's not a sufficient basis for getting  
23 immediate review rather than waiting until the  
24 end of the process.

25 The -- the one exception that I noted



1 at the beginning of my first argument was, in  
2 the collateral order context, the Court has  
3 recognized that orders denying a -- a statutory  
4 or constitutional immunity will ordinarily be  
5 appealable immediately.

6 And so under the double jeopardy  
7 clause, the -- the right protected by the  
8 Constitution is the right not to be placed twice  
9 in jeopardy. It is a right not to be tried.

10 JUSTICE ALITO: But here, in -- in  
11 cases like in these two cases, and other cases  
12 like it, put the APA aside. There is no  
13 statutory language that is similar to 1291.

14 What is -- what seems to me to be the  
15 -- like 1291 in these cases is simply an  
16 inference of congressional intent that you draw  
17 from the statutes, giving the courts of appeals  
18 jurisdiction to review certain orders of the  
19 administrative agencies.

20 The statute doesn't even say -- these  
21 two statutes don't even say exclusive  
22 jurisdiction. So we infer it's exclusive. And  
23 not only that, we infer that, except for some  
24 categories, some subcategory of cases, this not  
25 only gives the courts of appeals exclusive

1 jurisdiction, but it precludes jurisdiction that  
2 district courts would have under 1331.

3 MR. STEWART: You know, I said at the  
4 outset of this argument that in our view really  
5 the hardest question is whether Cochran should  
6 lose for jurisdictional reasons or should lose  
7 on some other basis because Standard Oil makes  
8 so clear that the commencement of an agency  
9 adjudication is not final agency action.

10 And -- and I -- I agree with you that  
11 it would certainly have been a plausible way for  
12 the Court to proceed to say that if a statute --  
13 if a claim asserts a violation of federal law,  
14 then by definition it arises under federal law  
15 and, therefore, it falls within the  
16 jurisdictional grant of 1331.

17 And if you filed your suit in district  
18 court, the district court has jurisdiction and  
19 there are lots of other potential objections to  
20 the suit going forward, but jurisdiction is not  
21 one of them.

22 That -- that would have been an  
23 entirely plausible way for the Court to approach  
24 this from the outset. But the Court has  
25 repeatedly done the contrary in Thunder Basin,

1 in Elgin, in Hinck versus United States. That  
2 was a case involving a statute that granted the  
3 tax court authority to review certain challenges  
4 to IRS decisions regarding the abatement of  
5 interest.

6 And the Court concluded that, yes, the  
7 suit that the plaintiff had filed in the Court  
8 of Federal Claims fell within the literal  
9 coverage of the Court of Federal Claims grant of  
10 jurisdiction, and also would have fell within  
11 the literal coverage of 1331.

12 But given Congress's evident intent  
13 that the tax court be the only available forum,  
14 that those courts were divested of jurisdiction.

15 Again, you could have come out the --  
16 the -- with the same bottom line by saying, yes,  
17 there was jurisdiction in the Court of Federal  
18 Claims, but the only cause of action that you  
19 had was elsewhere, and so your suit is  
20 dismissed.

21 And in stressing the jurisdictional  
22 aspect of this, we have tried to brief and argue  
23 the case in -- in the way that this Court has  
24 approached similar cases in the past, but  
25 certainly the -- the part of our brief that

1 addressed cause of action was intended to make  
2 the point that, even if you take the view that  
3 -- that Justice Alito has propounded and that  
4 Axon and Cochran have endorsed, in which  
5 anything that asserts a claim under federal law  
6 by definition arises within the district court's  
7 jurisdiction, it's a plausible way of  
8 approaching it, but the suits still couldn't go  
9 forward because they're not challenging anything  
10 that you can sue about.

11 And -- and, again, to us, the salient  
12 feature of cases like Elgin, whether or not you  
13 think it was right to couch this as a  
14 jurisdictional problem, is in deciding whether  
15 your suit can go forward in the court that you  
16 filed it in, we need to look at the agency  
17 action you're challenging, not at the legal  
18 theory you were asserting as a basis for finding  
19 that action invalid.

20 JUSTICE KAGAN: I thought Free  
21 Enterprise Fund pretty clearly put the kibosh on  
22 your cause of action argument.

23 MR. STEWART: Well, Free Enterprise  
24 Fund, as we pointed out in the brief, the PCAOB  
25 was not defined to be an agency. So any

1 arguments based on limitations imposed by the  
2 APA wouldn't have had purchase.

3 And we -- we don't have -- we don't  
4 quarrel with the -- the Free Enterprise Fund  
5 court's repetition of the fact that, yes, for a  
6 long period of time courts have had general  
7 equitable authority to grant relief designed to  
8 ensure that constitutional violations did not go  
9 unremedied, even in the absence of an express  
10 statutory authority.

11 But it's -- there's a big difference  
12 between saying the courts can step in to fill  
13 the gaps, as in Free Enterprise Fund where the  
14 APA didn't apply, or as in some other cases  
15 where Presidential action is at issue and the  
16 President is not an APA action.

17 It's very different to say a court can  
18 step in and fill the gaps and say the court can  
19 provide a cause of action kind of contrary to  
20 the dictates of the APA.

21 And, as I have said in the first  
22 argument, under Section 703, the APA -- we think  
23 of an APA suit as a suit in district court kind  
24 of under the APA's fallback authorization when  
25 no special review provision exists.

1           But the APA also says, when a special  
2   review provision does exist, you don't have the  
3   option of choosing between that and the district  
4   court suit.

5           You have to follow the special review  
6   provision, unless it's absent or inadequate.

7           JUSTICE JACKSON: Can I just clarify  
8   about the exclusivity of the court of appeals  
9   jurisdiction? I thought that was in the  
10   statute, once there's a final order. Is that  
11   right?

12          MR. STEWART: Once there's a final  
13   order, and I think it's once the administrative  
14   -- at some stage after the petition for review  
15   has been filed, that, I can't remember exactly  
16   the procedural step, but up until that time the  
17   agency can amend or clarify its opinion. And at  
18   a certain point the court of appeals  
19   jurisdiction becomes final so that the agency no  
20   longer has that authority.

21          But -- but that's -- that's not a  
22   question of division of responsibility between  
23   the court of appeals and the district court.  
24   That's a question of at what point does the  
25   agency lose the ability to amend its order

1 before the court of appeals reviews it.

2 JUSTICE JACKSON: And is your argument  
3 about the district court no longer retaining its  
4 jurisdiction under 1331 up until that point  
5 coming from the statute or the APA or where is  
6 it coming from?

7 MR. STEWART: I mean, it's coming from  
8 the combination of the -- of the Exchange Act  
9 review provision and the APA. That is, the  
10 Exchange Act review provision says the only  
11 court that can review the final order is the  
12 court of appeals.

13 And the APA says preliminary action is  
14 reviewed on review of the final agency action.  
15 And so that -- that necessarily means it will be  
16 reviewed by the court that has the authority to  
17 review the final agency action.

18 JUSTICE SOTOMAYOR: I -- I thought  
19 your pages 47 to 50 were saying we don't really  
20 need the APA, we just need the agency action  
21 that --

22 MR. STEWART: I -- I mean, it is -- it  
23 is certainly the case that our -- our 47 to 50  
24 included cases that were decided before the APA  
25 was enacted, and so the principle that courts

1 would not intervene long predated the APA. And  
 2 the APA simply confirms that by referring to  
 3 final agency action in Section 704.

4 But, when -- when we refer to  
 5 uncodified principles of administrative law,  
 6 we're met with the legitimate response by our --  
 7 our opposing counsel that uncodified principles  
 8 are less useful than enacted statutory text.

9 And so part of our reliance on the APA  
 10 is to show that these principles are not just  
 11 uncodified principles; they are actually law  
 12 enacted by Congress.

13 JUSTICE GORSUCH: Is the APA argument  
 14 waivable?

15 MR. STEWART: I -- I -- I guess -- we  
 16 have not waived -- we didn't waive it in --

17 JUSTICE GORSUCH: I -- I understand  
 18 that. Is it subject -- is it subject to waiver  
 19 and forfeiture?

20 MR. STEWART: I -- I don't think it is  
 21 waiver -- waivable. I -- it would be waivable,  
 22 but I think the Court has often distinguished  
 23 between waiver of a claim and waiver of an  
 24 argument in support of a claim. And so I think,  
 25 to the extent that we were -- are relying on APA



1 provisions to buttress arguments that we have  
2 been making all along, that that --

3 JUSTICE GORSUCH: But, in principle,  
4 it's not a jurisdictional problem that's not  
5 waivable?

6 MR. STEWART: Well, I mean, two --  
7 again, the Court has addressed this as a  
8 question of subject matter --

9 JUSTICE GORSUCH: I understand that.

10 MR. STEWART: And -- and --

11 JUSTICE GORSUCH: I'm asking for the  
12 government's view.

13 MR. STEWART: And -- yes, I think just  
14 as we could raise the question of jurisdiction  
15 for the first time in the Supreme -- in this  
16 Court, that is, if the Court had granted cert to  
17 decide a merits question, if we had never  
18 challenged jurisdiction before, but we came in  
19 and argued there was actually no jurisdiction  
20 here, perhaps the Court would DIG the case.

21 JUSTICE GORSUCH: What's -- what's the  
22 language in 704 that you view as jurisdictional  
23 then?

24 MR. STEWART: It's the language in  
25 704 --

1 JUSTICE GORSUCH: I think the sentence  
2 says that preliminary, procedural, or  
3 intermediate agency action, which is defined and  
4 we had that discussion earlier. I won't repeat  
5 that.

6 MR. STEWART: That, by its terms,  
7 doesn't address jurisdiction, but it does say  
8 the court that reviews the final agency decision  
9 will be the one that reviews the preliminary  
10 steps.

11 JUSTICE GORSUCH: No, let --

12 MR. STEWART: And that has  
13 jurisdictional --

14 JUSTICE GORSUCH: If I might finish,  
15 Mr. Stewart. It says that preliminary,  
16 procedural, or intermediate agency action --  
17 query whether we had that here as defined by  
18 551 -- or ruling not directly reviewable is  
19 subject to review on the review of the final  
20 agency action. It doesn't talk about  
21 jurisdiction. It doesn't talk about  
22 exclusivity.

23 So what do we do about that?

24 MR. STEWART: I mean, it buttresses a  
25 point that Justice Kagan was making in the first

1 argument, where she thought -- where she said,  
2 wouldn't you ordinarily presume that the court  
3 that is going to review the final decision will  
4 review preliminary steps along the way?

5 And our point was yes, you would  
6 ordinarily presume this, but this is express  
7 statutory authorization for it. And to the  
8 extent that the question is one of -- of the  
9 district court's subject matter jurisdiction,  
10 then the fact that it's a new argument can't --

11 JUSTICE GORSUCH: What -- what do  
12 about the fact that we normally say that  
13 jurisdictional statutes have to be stated  
14 clearly and -- and we don't presume that  
15 Congress is meaning to create a jurisdictional  
16 rule unless it's telling us that? And there's  
17 no language like that here.

18 MR. STEWART: Again, Section 704 in  
19 and of itself would not have any jurisdictional  
20 implications. And the dispute has been about  
21 whether the Exchange Act's conferral of  
22 authority on the court of appeals to review the  
23 --

24 JUSTICE GORSUCH: 704 itself is not  
25 jurisdictional. Is that -- I'm just trying to

1 get the government's view.

2 MR. STEWART: By itself, it would not  
3 limit any court's jurisdiction.

4 JUSTICE GORSUCH: Okay.

5 MR. STEWART: But it -- it does  
6 address the question which -- it doesn't specify  
7 which court should review any category of agency  
8 conduct, but it does say in general terms the  
9 court that reviews the final decision should  
10 review the antecedent steps.

11 And as I said in the first part of the  
12 argument, if this were the second sentence in  
13 the Exchange Act review provision, we would  
14 think of it as powerful evidence that a review  
15 of the initiation of the proceeding could take  
16 place only on review of the final order.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Justice Thomas, anything further?

20 Anything further?

21 JUSTICE KAVANAUGH: Yes, one question.  
22 On Justice Gorsuch's questions, how relevant is  
23 703, which is the provision -- you referenced it  
24 earlier -- that says the form of proceeding for  
25 judicial review is the special statutory review

1 proceeding relevant to the subject matter in a  
2 court. Is -- is that relevant at all?

3 MR. STEWART: Oh, it's highly relevant  
4 because what the Court has often said in cases  
5 like Thunder Basin is that when Congress creates  
6 a detailed, specific scheme for review of a  
7 particular category of agency action, we will  
8 often infer that Congress intended that scheme  
9 to be exclusive and that no other court will be  
10 able to review the same agency action.

11 And that language from 703 provides  
12 express statutory confirmation of that -- that  
13 inference. It says the form of proceeding for  
14 -- "the form of proceeding" -- definite  
15 article -- "for judicial review is the special  
16 statutory review proceeding relevant to the  
17 subject matter" -- which, here, everyone agrees  
18 is the Exchange Act review scheme -- "in a court  
19 specified by statute" -- which is the court of  
20 appeals -- "or, in the absence or inadequacy  
21 thereof, any applicable form of legal action."  
22 And so it does contemplate that district court  
23 would --

24 JUSTICE KAVANAUGH: Inadequacy it  
25 contemplates?

1 MR. STEWART: Inadequacy.

2 JUSTICE KAVANAUGH: Yeah.

3 MR. STEWART: It contemplates that in  
4 many instances -- the word "absence"  
5 contemplates that with respect to many types of  
6 agency conduct, there won't be a special  
7 statutory review provision. And it also  
8 contemplates that sometimes there might be one,  
9 but it will be inadequate for a particular type  
10 of claim.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Barrett?

13 Justice Jackson?

14 JUSTICE JACKSON: Can I just clarify,  
15 because I was very interested in your argument  
16 that there may still be other bases for  
17 thwarting the claims that are being brought in  
18 this case, and I just want to make sure that I  
19 understand what you mean by that.

20 As I see what you're saying, that the  
21 very structural constitutional claims that the  
22 plaintiffs would like to bring in district  
23 court, you would read the statutes here,  
24 jurisdictionally maybe, to allow them to bring  
25 it under 1331, but when you got into district

1 court, the government might point to the APA to  
2 say there's no final agency action, so you can't  
3 proceed under those claims. Is that right?

4 MR. STEWART: I think that's right,  
5 although I would say more generally the -- the  
6 logical thrust of the textual argument on the  
7 other side, and -- and, really, the logical  
8 thrust of Justice Alito's question, was 1331  
9 confers jurisdiction, it encompasses any suit  
10 arising under federal law, the Exchange Act  
11 review provision doesn't specifically divest  
12 that jurisdiction, and, therefore, the district  
13 court has -- has at least jurisdiction to  
14 entertain the claim.

15 That -- that logic would apply not  
16 just to structural constitutional challenges but  
17 would apply to any claim as like the one in  
18 Standard Oil that was based on a federal  
19 statute. And so, at that point, we would say  
20 that wouldn't have been an implausible reading  
21 of the jurisdictional statute, but once you  
22 surmounted the -- the pretty easy jurisdictional  
23 hurdle, we would still be able to interpose  
24 final agency action objections, et cetera.

25 Now I -- I take the thrust of the

1 argument on the other side to be that structural  
2 constitutional challenges are not simply  
3 challenges that fall within the 1331  
4 jurisdiction but challenges that can actually be  
5 brought in court and that will surmount any  
6 other types of non-jurisdictional challenges  
7 because it's uniquely important that they be  
8 adjudicated quickly.

9 If -- if I've misunderstood Mr.  
10 Garre's argument, he can correct me, but I took  
11 their argument to be, with respect to structural  
12 constitutional claims, not just that the  
13 district court would have jurisdiction but that  
14 the court would be obligated to decide them on  
15 the merits.

16 JUSTICE GORSUCH: I'm sorry.

17 CHIEF JUSTICE ROBERTS: Yeah,  
18 certainly.

19 JUSTICE GORSUCH: I apologize for this  
20 last question, but you brought up 703 for the  
21 first time here a moment ago, and as I  
22 understand that provision, it says with respect  
23 to statutes that do provide a form of review --  
24 you used that, and, here, we have one that  
25 speaks of final orders, final orders, nothing



1     else. And in the absence of a statute that  
2     speaks to that -- that question, you normally  
3     proceed as you would in any court of competent  
4     jurisdiction. Is that right?

5             MR. STEWART: You would proceed in  
6     what other -- whatever court was otherwise --

7             JUSTICE GORSUCH: Competent  
8     jurisdiction?

9             MR. STEWART: -- competent -- for  
10    jurisdictional purposes.

11            JUSTICE GORSUCH: Yeah.

12            MR. STEWART: Now there was --

13            JUSTICE GORSUCH: Right, for  
14    jurisdictional purposes. Right.

15            MR. STEWART: But your --

16            JUSTICE GORSUCH: Thank you. Thank  
17    you.

18            CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
19    Garre?

20            REBUTTAL ARGUMENT OF GREGORY G. GARRE

21            ON BEHALF OF MICHELLE COCHRAN

22            MR. GARRE: Thank you, Mr. Chief  
23    Justice.

24            I think it's telling that my friend  
25    had very little to say about the actual text of

1 78y of the SEC Act and that, instead, his  
2 argument has migrated towards non-jurisdictional  
3 arguments based on the APA. Those arguments can  
4 be and have been waived here. I think they're  
5 irreconcilable with Free Enterprise Fund itself,  
6 and they provide no basis for holding that there  
7 -- the district courts lack jurisdiction over  
8 this important class of claims.

9 I heard my friend complaining about  
10 the -- the difficulties of determining whether  
11 or not a claim is a structural constitutional  
12 claim or drawing the line in the district court.  
13 We don't think that that will be difficult at  
14 all. This Court has already talked about and  
15 discussed and is familiar with the concept of  
16 structural constitutional violations.

17 That's a line that -- that can be  
18 drawn. But to be clear, to the extent that  
19 there are any practical problems with that, they  
20 pale in comparison with the practical hardships  
21 that individuals face in being subjected to  
22 years of proceeding before an unconstitutional  
23 administrative decisionmaker, before they can  
24 get before an Article III court to -- to raise a  
25 blatant constitutional defect with those

1 decisionmakers.

2 Congress knows how to strip  
3 jurisdiction when it wants to. There are scores  
4 of statutes in which Congress has explicitly  
5 stripped jurisdiction, including district court  
6 jurisdiction.

7 Congress did not do so either in the  
8 SEC Act or anything else that the government has  
9 pointed to. District courts have jurisdiction  
10 that they have long exercised to protect against  
11 these unconstitutional agencies' decisionmakers.

12 We ask that the Court affirm the  
13 judgment below.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel. The case is submitted.

16 (Whereupon, at 12:45 p.m., the case  
17 was submitted.)

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## Official - Subject to Final Review

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